[NOT YET SCHEDULED FOR ORAL ARGUMENT]
No. 09-5196

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMPRESA CUBANA EXPORTADORA DE ALIMENTOS Y PRODUCTOS VARIOS D/B/A CUBAEXPORT,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici.

The plaintiff is Empresa Cubana Exportadora de Alimentos y Productos Varios, which does business as Cubaexport. It is a Cuban state-owned enterprise. The defendants are the Office of Foreign Assets Control within the United States Department of Treasury, the Secretary of the Treasury (Timothy F. Geithner), the Director of the Office of Foreign Assets Control (Adam J. Szubin), and the United States of America.

B. Rulings Under Review.

The ruling under review is the order granting summary judgment to defendants issued by Chief Judge Lamberth and entered on the docket on March 30, 2009 (Docket No. 44). The accompanying opinion is published at 606 F. Supp. 2d 59 (D.D.C. 2009).

C. Related Cases.

This case has not previously been before this or any court other than the district court below.

March 15, 2010

/s/ Jonathan H. Levy
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GLOSSARY

APA	Administrative Procedure Act
CACR	Cuban Assets Control Regulations
Cubaexport	Empresa Cubana Exportadora de Alimentos y Productos Varios
OFAC	Office of Foreign Assets Control (within the Treasury Dept.)
JA	Joint Appendix
USPTO	United States Patent and Trademark Office
Section 211	Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 211, 112 Stat. 2681, 2681-88
TWEA	Trading With the Enemy Act

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STATEMENT OF JURISDICTION

Plaintiff Cubaexport invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 & 1361. The district court entered an order dismissing the case with prejudice on March 30, 2009. Cubaexport filed a notice of appeal on May 28, 2009. JA 465-67. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The Cuban Assets Control Regulations prohibit persons subject to United States jurisdiction from engaging in most transactions with Cuban persons (including

Cubaexport). Prior to 1998, a Treasury Department "general license" allowed specified transactions related to intellectual property that would otherwise have been prohibited, including paying trademark registration renewal fees and renewing trademark registrations. In 1998, Congress passed a law effectively repealing that general license as applied to trademarks associated with confiscated businesses. Cubaexport sought a "specific license" to renew such a registration. OFAC determined that the registration renewal fee could not be paid without a specific license, but declined to issue such a license. The questions presented are:

1. Does Cubaexport, a non-resident alien lacking substantial connection to the United States, have due process rights?

2. Did Congress violate substantive due process by enacting a statute that changed the requirements for Cuban entities to renew their trademark registrations?

3. Did the Treasury Department violate procedural due process or the Administrative Procedure Act by deciding an issue that Cubaexport specifically requested the Government to decide?

4. Did the Treasury Department violate the Administrative Procedure Act by declining, on foreign policy grounds as recommended by the State Department, to authorize the renewal of the HAVANA CLUB trademark registration?

STATUTES AND REGULATIONS

All applicable statutory and regulatory provisions are contained in the brief for Cubaexport. See D.C. Circuit Rule 28(a)(5).

STATEMENT OF THE CASE

The Cuban Assets Control Regulations (CACR) broadly bar persons subject to United States jurisdiction from engaging in transactions with Cuban persons (including entities like Cubaexport) that are not authorized by either a general or a specific license issued by the Treasury Department. Before 1998, a general license authorized specified financial transactions by Cuban entities related to intellectual property, including the payment of fees to obtain or renew a United States trademark registration. Pursuant to that general license, Cubaexport registered the HAVANA CLUB trademark and renewed that registration.

In 1998, Congress enacted a statute that invalidated this general license with respect to any transaction relating to a trademark that is the same as or substantially similar to a trademark associated with a business or assets that had been confiscated. This statute applied to the HAVANA CLUB registration because the HAVANA CLUB mark had previously been used and registered by a Cuban business whose assets were confiscated by the Castro regime. In 2005, Cubaexport sought to renew its United States registration for the HAVANA CLUB trademark. When a law firm

representing Cubaexport tendered the renewal fee to the United States Government, Cubaexport asserted that it was permitted to do so under a previously issued specific license relating to payments for legal representation. The Treasury Department responded that the previously issued specific license did not authorize the payment of the renewal fee, and the law firm then sought a new specific license to authorize the payment of the renewal fee. The Treasury Department noted that a specific license would be necessary, but declined to issue one based on foreign policy considerations as communicated to it by the State Department.

Cubaexport filed an action in district court challenging the statute and the Treasury Department's implementation of it. On cross-motions to dismiss and/or for summary judgment, the district court rejected all of Cubaexport's claims, granted summary judgment to the Government, and dismissed Cubaexport's complaint. This appeal followed.

STATEMENT OF THE FACTS

I. STATUTORY AND REGULATORY BACKGROUND

In response to the expropriation of United States property in Cuba and other acts by the Castro regime deemed antagonistic to the interests of this country, President Kennedy imposed an embargo on trade with Cuba in February 1962. See Proclamation 3447 of February 7, 1962, 27 Fed. Reg. 1085 (1962). The current terms

of the embargo and related restrictions are reflected in the Cuban Assets Control Regulations (CACR), 31 C.F.R. pt. 515, which were promulgated pursuant to section 5(b) of the Trading With the Enemy Act ("TWEA"), 50 U.S.C. App. § 1 et seq. See Emergency Coalition to Defend Educational Travel v. United States Dep't of Treasury, 545 F.3d 4, 6 (D.C. Cir. 2008) (Cuban embargo background).

A. The Trading With the Enemy Act.

TWEA broadly authorizes the President, through a designated agency, to "investigate, regulate, . . . prevent or prohibit, any . . . use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or . . . transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States." 50 U.S.C. App. § 5(b)(1)(B). The President has authorized the Secretary of the Treasury to take such actions, including the promulgation of rules and regulations, as may be necessary to implement the TWEA. See, e.g., Exec. Order No. 12854, 58 Fed. Reg. 36587 (July 4, 1993).

In 1977, Congress limited the President's authority under TWEA, which had previously encompassed peacetime national emergencies, to times of war. See Pub. L. No. 95-223, § 101, 91 Stat. 1625, 1625-26; Regan v. Wald, 468 U.S. 222, 227–28

(1984).[1] The 1977 amendment, however, included a "grandfather clause," which authorized the President to continue to exercise his authority under section 5(b) of TWEA with respect to any country that had been subject to sanctions on July 1, 1977, including Cuba. See note following 50 U.S.C. App. § 5; Wald, 468 U.S. at 228–29. This grandfather clause also allowed the President to "extend the exercise of such authorities for one-year periods upon a determination for each such extension that the exercise of such authorities with respect to such country for another year is in the national interest of the United States." Note following 50 U.S.C. App. § 5; Wald, 468 U.S. at 229. Since 1978, pursuant to this authority, Presidents have annually made this determination. See, e.g., Determination No. 2009-27, 74 Fed. Reg. 47431 (Sept. 11, 2009) (most recent renewal of the President's TWEA authority to continue economic sanctions against Cuba); see also Wald, 468 U.S. at 229; Walsh v. Brady, 927 F.2d 1229, 1230 (D.C. Cir. 1991).

B. The Cuban Assets Control Regulations (CACR).

The CACR, 31 C.F.R. pt. 515, were first promulgated in 1963 pursuant to TWEA and are administered by the Treasury Department's Office of Foreign Assets Control ("OFAC"). See United States v. Brodie, 403 F.3d 123, 127 (3d Cir. 2005);

[1] At the same time, Congress enacted the International Emergency Economic Powers Act, which governs the President's exercise of emergency economic powers during peacetime. See 50 U.S.C. § 1701 et seq.; Wald, 468 U.S. at 227–28.

Empresa Cubana del Tabaco v. Culbro Corp., 399 F.3d 462, 465 (2d Cir. 2005). Among other things, the CACR prohibit transactions in the United States involving property in which Cuba or any Cuban national has "any interest of any nature whatsoever, direct or indirect," except "as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him)." 31 C.F.R. § 515.201(b).

Accordingly, in order for Cuba or a Cuban national to engage in any prohibited transaction with an individual or entity in the United States involving property, that individual or entity must be licensed by the Treasury Department to engage in that transaction. See id. § 515.201(b). That license may be either general, where the terms of the authorization are set forth in OFAC publications or regulations, see id. § 515.317, or specific to an applicant or transaction, see id. § 515.318. The CACR define the concept of property and property interests broadly, including interests in intellectual property. Id. § 515.311.

For a number of years, Cuba and its nationals were authorized to engage in specified transactions relating to the registration and renewal of trademarks under an OFAC general licensing provision. See id. § 515.527(a)(1). In 1998, however, Congress limited this general license:

> Notwithstanding any other provision of law, no transaction

> or payment shall be authorized or approved pursuant to [31 C.F.R. § 515.527] with respect to a mark, trade name, or commercial name that is the same as or substantially similar to a mark, trade name, or commercial name that was used in connection with a business or assets that were confiscated unless the original owner of the mark, trade name, or commercial name, or the bona fide successor-in-interest has expressly consented.

Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, § 211(a)(1), 112 Stat. 2681, 2681-88 ("§ 211"). This provision means that, from 1998 forward, the general license no longer authorizes any Cuban individual or entity to register or renew (including payment of the associated fee) any trademark associated with a confiscated business (or assets), absent consent from the original owner of that mark (or its bona fide successor-in-interest). Instead, a specific license from OFAC is required before a Cuban entity can pay the fee necessary to register or renew such a mark.[2] Congress expressly incorporated the then-existing regulatory definition of "confiscated," which included "[t]he nationalization, expropriation, or other seizure by the Cuban Government of ownership or control of property, on or after January 1, 1959: (1) Without the property having been returned or adequate and effective compensation provided; or (2) Without the claim to the property having

[2] Section 211(c) required the Secretary of the Treasury to amend the CACR to conform to the new legislative requirement, and this amendment was made. See 31 C.F.R. § 515.527(a)(2); see also JA 73 ¶ 22.

been settled pursuant to an international claims settlement agreement or other mutually accepted settlement procedure." 31 C.F.R. § 515.336 (incorporated by reference in § 211(d)(2), 112 Stat. at 2681-88).

II. PROCEDURAL BACKGROUND OF THIS LITIGATION

A. General Background of the HAVANA CLUB Trademark.

In 1976 (prior to the enactment of § 211), the United States Patent and Trademark Office ("USPTO") issued a registration to Cubaexport for a trademark including the name HAVANA CLUB in the United States. JA 12-13 ¶¶ 12-13. In 1995, Cubaexport applied for and received from OFAC a specific license authorizing the assignment of the HAVANA CLUB trademark through an intermediary to a Cuban company, Havana Club Holding, S.A. See JA 74 ¶¶ 23-24. In 1996, Havana Club Holding, as the "owner of record" of the mark, renewed the registration (creating a new expiration date of July 27, 2006), JA 14 ¶ 19. However, in 1997, OFAC revoked the specific license it had previously issued to Cubaexport. See JA 74 ¶ 25. The grant and subsequent revocation of this specific license were extensively litigated in a trademark infringement action brought by Havana Club Holding against Bacardi-Martini USA, Inc. ("Bacardi").[3] See Havana Club Holding,

[3] Other plaintiffs and defendants were involved in this litigation, but their involvement is not directly relevant here.

S.A. v. Galleon S.A., 961 F. Supp. 498 (S.D.N.Y. 1997) ("HCH I"); 974 F. Supp. 302 (S.D.N.Y. 1997) ("HCH II"); 96 Civ. 9655, 1998 WL 150983 (S.D.N.Y. Mar. 31, 1998) ("HCH III"); 62 F. Supp. 2d 1085 (S.D.N.Y. 1999) ("HCH IV"); 203 F.3d 116 (2d Cir. 2000) ("HCH V").[4]

In HCH I, 961 F. Supp. at 503-05, the district court rejected Bacardi's challenge to OFAC's initial grant of the license to Cubaexport, holding that Bacardi lacked standing to challenge this action, that the foreign policy considerations of the Executive Branch should not be disturbed by the judiciary, and that OFAC has considerable discretion in granting licenses. In HCH II, 974 F. Supp. 302, the court gave effect to OFAC's revocation of the specific license. Giving "'considerable weight'" to OFAC's interpretation of the CACR, id. at 307 (quoting Chevron U.S.A. v. NRDC, 467 U.S. 837, 844 (1984)), the court concluded that, without a specific license, the transfer of the trademark registration by Cubaexport to Havana Club Holding had been invalid and Havana Club Holding had no continuing right to the Havana Club trademark, which reverted to Cubaexport. See id. at 306-11.

Following this decision, the court proceeded to a bench trial on trade name infringement claims by Havana Club Holding against Bacardi. HCH IV, 62 F.

[4] A somewhat detailed analysis of these decisions is appropriate because, as noted below, OFAC considered some of their findings.

Supp.2d 1085. Significant to the case at bar, the district court found that "on October 13, 1960, the Revolutionary Cuban Regime confiscated the physical assets, property and business records of [Jose Arechabala, S.A.], the original owner of the Havana Club trademark" without affording any compensation. Id. at 1092. The court ultimately entered judgment in Bacardi's favor. Id. at 1100.

On appeal, the Second Circuit affirmed the district court's judgment. HCH V, 203 F.3d 116. The Second Circuit denied Havana Club Holding's request for an opportunity to conduct additional discovery related to whether the "Havana Club" trade name was associated with confiscated property, holding that "[w]here Cuba has not returned [Jose Arechabala]'s property, not made even a gesture toward compensation, and not settled the claim, the confiscation inquiry ends." Id. at 129-30.

USPTO's records had shown Havana Club Holding as the "owner of record" of the mark. Because this notation was inconsistent with the results of the litigation as described above, USPTO amended its records to restore Cubaexport as the owner of the registration. Galleon S.A. v. Havana Club Holding, S.A., 2004 WL 199225, at *11 (TTAB Jan. 29, 2004).

Bacardi then initiated administrative proceedings before the USPTO's Trademark Trial and Appeal Board ("USPTO Board") seeking cancellation of Cubaexport's registration on several bases, including fraud in the original application.

See Galleon, 2004 WL 199225, at *11. The Board refused to cancel Cubaexport's registration. Id. at *23. Bacardi has sought review of the Board's decision in the United States District Court for the District of Columbia. See Bacardi & Co. Ltd. v. Empresa Cubana Exportadora de Alimentos y Productos Varios, 1:04-CV-00519 (EGS) (D. D.C.) (filed Mar. 29, 2004); see also JA 16 ¶ 23. That litigation has been stayed pending the completion of administrative proceedings at the USPTO regarding Cubaexport's renewal of the mark. See Cubaexport Br. 19.

B. Recent OFAC Administrative Proceedings Relating to Cubaexport's Application for a Specific License.

As a result of the CACR's prohibition on persons subject to the jurisdiction of the United States engaging in transactions involving property in which the Cuban government or a Cuban national has an interest, a lawyer is unable to receive compensation for fees and expenses incurred in representing such entities in legal proceedings without a specific license from OFAC. See 31 C.F.R. § 515.512. Similarly, a lawyer cannot engage in Cuban travel-related transactions to engage in research related to the legal representation without a specific travel license. See 31 C.F.R. § 515.560.[5]

[5] The CACR do not, however, prevent the mere formation of an attorney-client relationship. American Airways Charters, Inc. v. Regan, 746 F.2d 865, 866-67 (D.C. Cir. 1984).

Accordingly, in order to obtain reimbursement for the fees and expenses related to the representation of Cubaexport in legal proceedings in the United States, including proceedings before the USPTO Board, Cubaexport's attorneys have applied for and received from OFAC various specific licenses, including License Nos. CU-71416, CU-71417, CU-74488, CT-1943, and CT-4558. JA 51-54, 166-167, 481-484. In January 2005, Ropes & Gray, which had merged with the law firm of Fish & Neave, Cubaexport's prior counsel, applied to OFAC for a renewal of the legal and travel licenses previously issued to Fish & Neave so that Ropes & Gray could provide compensated legal services to Cubaexport in connection with specified legal matters. See JA 19-20 ¶ 35; see also JA 164-165. In the application, Ropes & Gray asserted that it "will be the law firm representing Cubaexport in connection with the . . . matters" previously mentioned in the application, namely the cancellation proceeding brought by Bacardi before the USPTO Board and the district court action challenging the result of that proceeding. JA 165; see also JA 154 (referring only to the district court action).

OFAC granted License No. CU-74488, which authorized "[a]ll transactions . . . to enable the Licensee, in connection [with] the legal representation of [Cubaexport] and Havana Club Holdings S.A. in legal proceedings in the United States related to the HAVANA CLUB trademark, as described in the application, to receive payment

for such services and reimbursement for expenses related to such services." JA 482. OFAC also issued a companion travel license, see JA 483-484, and responded to Ropes & Gray's request for renewal of these licenses by issuing two new licenses in April 2006. JA 128-131.

On December 13, 2005, Cubaexport filed an application with the USPTO to renew the HAVANA CLUB trademark. See JA 143-153, 468-480. In a letter attached to the application, Ropes & Gray represented on Cubaexport's behalf that "[p]ayment of the filing fee is being made pursuant to License No. CU 74488 . . . in order to maintain the status quo by maintaining [the HAVANA CLUB registration] until a decision regarding cancellation of the registration can be rendered in ongoing litigation, Bacardi & Company Limited v. Cubaexport and Havana Club Holding, 1:04-CV-00519 (EGS) (D. D.C. 2004)." JA 143. Ropes & Gray forwarded a copy of this letter to OFAC, with a cover letter making essentially the same representations. JA 140-142.

On April 6, 2006, OFAC informed both Ropes & Gray and the USPTO that License No. CU-74488 did not authorize Ropes & Gray LLP to pay the filing fee. JA 136. OFAC noted that, on its face, the license only authorized "'transactions . . . in connection [with] the legal representation of [Cubaexport] in legal proceedings in the United States related to the HAVANA CLUB trademark, as described in the

application.'" JA 136 (quoting License CU-74488) (emphasis in JA 136). In turn, "[t]he only legal proceeding described in [the] application was 'a complaint [] currently pending in the U.S. District Court for the District of Columbia against . . . Cubaexport and Havana Club Holdings S.A." Id. While noting the limited scope of the previously issued specific license (No. CU-74488), OFAC specifically informed Ropes & Gray that it could seek a separate specific license with respect to the renewal of the HAVANA CLUB trademark registration:

> We note that this discussion does not in any way prejudice the ability of Ropes & Gray LLP to request separate authorization from OFAC to engage in transactions related to the renewal of the HAVANA CLUB trademark registration at the PTO. If you wish to request such a specific license or further guidance from OFAC, you may do so by writing directly to OFAC's Licensing Division.

JA 137.

The next day (April 7, 2006), Ropes & Gray responded to OFAC's letter by requesting a specific license to authorize payment of the HAVANA CLUB registration renewal fee. JA 132-134. Ropes & Gray asserted that such a license should issue for the reasons provided in its December 13, 2005, letter. JA 133.

After a few months without a decision on this specific license request, Ropes & Gray wrote a letter to USPTO (copied to OFAC and made a part of the OFAC administrative record now before this Court) in which it asked USPTO to allow it to

pay the renewal fee "[e]ven if OFAC does not act on the request for a specific license or denies that license." JA 118. Ropes & Gray argued that USPTO "should not conclude that the CACR prohibit renewal of the registration," JA 117, and, more specifically, that USPTO should "interpret[] the general license provisions of 31 [C.F.R.] § 515.[5]27(a)," and should conclude that those provisions do not prohibit payment of the renewal fee, JA 118 (emphasis in original).

Meanwhile, OFAC referred the request for a specific license to the United States Department of State for guidance concerning whether the grant of such a license would be consistent with United States foreign policy. See JA 78 ¶ 38; JA 85-86. The State Department ultimately informed OFAC that "[d]enial of the license application would be consistent with the U.S. approach toward non-recognition of trademark rights associated with confiscated property." JA 85. Accordingly, "[h]aving weighed the facts and foreign policy concerns presented by this referral, the State Department recommend[ed] that OFAC deny Ropes & Gray's application." JA 86; accord JA 78 ¶ 39.

On July 28, 2006, in accordance with the State Department's guidance, the provisions of the CACR, and OFAC's own consideration of the facts underlying the application, OFAC sent Ropes & Gray a letter stating that OFAC had denied the request for a specific license. JA 84; see also JA 79 ¶¶ 40-41. In the letter, OFAC

explained that the Department of State had informed OFAC that "it would be inconsistent with U.S. policy to issue a specific license authorizing transactions related to the renewal of the HAVANA CLUB trademark." JA 84.

The July 28, 2006 letter from OFAC also noted that a specific license was required for the renewal of the trademark. JA 84. This conclusion was based on 31 C.F.R. § 515.527(a)(2), which tracks the statutory requirements of § 211. See JA 273-274 ¶ 7. In concluding that the HAVANA CLUB mark fell within the scope of § 211 and 31 C.F.R. § 515.527(a)(2), OFAC considered correspondence from both Cubaexport and Bacardi as well as "factual findings made in litigation in the Southern District of New York and the Second Circuit." JA 274 ¶ 10; see JA 274-276 ¶¶ 10-14.

On August 3, 2006, the USPTO informed Ropes & Gray that Cubaexport's renewal application could not be accepted "[b]ecause the specific license is necessary for authorizing payment of the required fee, and that license has been denied [by OFAC]." JA 56. This rejection of the renewal application is the subject of a pending petition for administrative review at the USPTO. Consideration of that petition has been stayed pending the outcome of this case. JA 387.

C. Proceedings Below.

Cubaexport filed the instant action in district court against OFAC, challenging

three administrative decisions under the Administrative Procedure Act (APA), the Due Process Clause, and the Takings Clause. Those three administrative decisions were (1) the conclusion in the April 6, 2006 OFAC letter that specific license No. CU-74488 did not authorize Ropes & Gray to pay a filing fee for the renewal of the HAVANA CLUB trademark registration; (2) the conclusion in the July 28, 2006 OFAC letter that TWEA and the CACR prohibited the renewal of the HAVANA CLUB trademark registration unless such renewal was specifically licensed; and (3) the denial in the July 28, 2006 OFAC letter of the requested specific license. Cubaexport also alleged that § 211 and 31 C.F.R. § 515.527 violate both the Due Process and the Takings Clauses, facially and as applied to Cubaexport here. See JA 255.

The district court first granted the Government summary judgment with respect to the effect of specific license CU-74488. It noted that, on its face, the license expressly applies only to representation of Cubaexport in the appeal (separately pending in the district court) from the USPTO Board's denial of Bacardi's cancellation petition "and nothing more." JA 261. The district court deferred to (and found reasonable) OFAC's assessment that the renewal was a separate action external to the district court litigation. JA 261-262.

The district court also granted summary judgment with respect to Cubaexport's

assertion that it was arbitrary or capricious for OFAC to deny the request for a specific license with respect to the registration renewal. Cubaexport had argued that this denial was arbitrary in light of the previous specific licenses that OFAC had granted relating to legal representation regarding the USPTO Board cancellation proceeding and the judicial review of that proceeding. The district court held that OFAC reasonably treated the USPTO Board cancellation proceeding as separate from the USPTO renewal process: in the former proceeding, Cubaexport was "defend[ing] its already-acquired property rights in its existing HAVANA CLUB registration," while in the latter it sought to "extend its rights in the mark for another ten years." JA 267 (emphases in original).

The district court then remanded the matter to OFAC for a more detailed explanation regarding the roles of § 211 and 31 C.F.R. § 515.527 in OFAC's actions. JA 268-269. OFAC provided such an explanation. See JA 272-280 (supplemental declaration of Adam J. Szubin).

The district court then issued a second opinion, rejecting the remainder of Cubaexport's claims. JA 430-464. With respect to Cubaexport's remaining APA claim, the district court held that OFAC had correctly interpreted the "plain meaning" of § 211, particularly with respect to the word "confiscated," and that, even if the statute had been ambiguous, OFAC's interpretation was reasonable and entitled to

deference. JA 441-443. The court further held that OFAC did not violate the APA in concluding that HAVANA CLUB was the same as or substantially similar to a mark that was used in connection with a business or assets that were confiscated. See JA 444-453. Reviewing OFAC's determination solely for reasonableness under the APA, JA 445 n.12, the district court noted that OFAC's determination was based on judicial opinions that "certainly provided a rational basis for OFAC to determine" that HAVANA CLUB is a mark described in § 211. JA 445; accord JA 447 ("[T]here is square precedent in federal court to support OFAC's determination in the present case that Cubaexport confiscated the HAVANA CLUB trademark and that the original owner of the mark has not consented to the use of the mark by Cubaexport."). Procedurally, the district court held that OFAC's determination was not flawed because the APA required none of the special procedures Cubaexport claimed applied. JA 443-444.

The district court further turned aside Cubaexport's challenge to 31 C.F.R. § 515.527 as an unwarranted deviation from OFAC's previous policy of allowing Cuban entities to renew their previously-existing trademark registrations, noting that "this argument has no merit when a change in policy derives from specific congressional action." JA 451.

With respect to the constitutional claims, the district court held, as a

preliminary matter, that Cubaexport had standing. JA 455. Despite being "state-owned" and possessing "some characteristics of a 'foreign nation,'" Cubaexport is not an agent of Cuba, according to the district court, because it "engages in commercial operations . . . enters into contracts in its own name, pays taxes to Cuba, and applied for the registration of the HAVANA CLUB trademark in its own name." JA 454-455. The district court also found that Cubaexport had sufficient contacts with the United States to confer constitutional rights because the United States had denied its application to renew the HAVANA CLUB trademark registration. JA 457 n.26.

When it reached the merits, however, the district court rejected Cubaexport's constitutional claims. With respect to procedural due process, the district court held that, to the extent that § 211 and 31 C.F.R. § 515.527 did not put Cubaexport on notice that it could not renew its trademark registration without a specific license, OFAC did so during the course of the relevant administrative proceedings, and also gave Cubaexport the opportunity to be heard. JA 458-461. With respect to substantive due process, the district court noted that neither on its face, nor as applied to Cubaexport here, did § 211 or 31 C.F.R. § 515.527 retroactively deprive Cubaexport of property; they merely "prospectively affected the conditions under which a trademark could be renewed." JA 462. With respect to the Takings Clause claim, without determining whether it had jurisdiction, the district court held that

because there was no vesting of property in the United States, there was no taking and therefore no constitutional violation. JA 463-464.

Accordingly, the district court entered a judgment against Cubaexport with respect to all its claims. This appeal followed.[6]

SUMMARY OF THE ARGUMENT

Cubaexport is not entitled to the protections of the Due Process Clause because it is a non-resident alien with only insubstantial contacts with the United States. Even if the Due Process Clause applied, Cubaexport received all the process required. With respect to substantive due process, Congress impaired no settled property interest when it modified a general license that was explicitly subject to modification, especially where Congress prospectively altered the circumstances for renewing a trademark. Even if Congress's actions were construed as retroactive, due process was not offended because Congress simply implemented a legitimate foreign policy in a rational way. With respect to procedural due process, Cubaexport received notice and the opportunity to be heard. Indeed, it actually made its arguments to the agency; those arguments were simply rejected.

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[6] In this appeal, Cubaexport has dropped a number of the issues that it had pressed before the district court, including all of its claims under the Takings Clause and its claim that specific license CU-74488 authorized the payment of the renewal fee.

Cubaexport's arguments under the APA fare no better. As a substantive matter, OFAC properly applied the statute here. Indeed, Cubaexport concedes that OFAC's interpretation was the interpretation intended by Congress. Cubaexport's only arguments against the application of the statute are contrary to published judicial opinions, and Cubaexport declined to present to OFAC any evidence in support of those arguments. With respect to the exercise of its discretion to issue specific licenses, OFAC reasonably relied upon the foreign policy of the United States to deny the license, as recommended by the State Department.

Cubaexport's procedural arguments under the APA fail as well. The APA imposed no particular procedures on OFAC's decisions here, and, as noted above, Cubaexport had notice and the opportunity to be heard (and, indeed, actually was heard) on all of the relevant issues.

ARGUMENT

I. ANY CONSTITUTIONAL RIGHTS TO WHICH CUBAEXPORT WAS ENTITLED WERE RESPECTED.

A. The Due Process Clause Does not Apply to Cubaexport.

1. This Court should not reach the question of whether Cubaexport is an agent of the Cuban government.

This Court has held that "foreign states are not 'persons' protected by the Fifth Amendment," Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 96

(D.C. Cir. 2002), nor are "'government instrumentalities' . . . where the foreign state so extensively controlled the instrumentality 'that a relationship of principal and agent is created,'" TMR Energy Ltd. v. State Property Fund of Ukraine, 411 F.3d 296, 301 (D.C. Cir. 2005) (quoting First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 626-27, 629, 632 (1983)). In response to the argument of the United States that Cubaexport might be such an agent of the Cuban government, the district court stated that "it does not appear that the Cuban government exerted 'sufficient control over [Cubaexport] to make it an agent of the State' for Fifth Amendment purposes." Id. (quoting TMR, 411 F.3d at 300).

The record relevant to this question is extremely limited, consisting entirely of the declaration of Cubaexport's managing director, JA 227-229, and the Cuban Ministry of Foreign Commerce resolution creating Cubaexport, JA 235-237. The truncated nature of this record militates against this Court unnecessarily deciding here the question of whether Cubaexport is actually an agent of the Cuban government. As described in greater detail below, the district court's due process decision can – and should – be affirmed on other grounds: Cubaexport is not entitled to constitutional due process protections because it has insufficient contacts with the United States, see Section I.A.2 below, and, at any rate, Cubaexport received all of the process to which it would have been entitled had it been covered by constitutional

due process protections, see Section I.B below. By addressing either of these points, this Court can properly dispose of Cubaexport's due process claims, and the Government has accordingly elected not to press the alternative argument made below that Cubaexport is an agent of the Cuban government and is not entitled to any constitutional due process protections for that reason.

2. Cubaexport is a non-resident alien with only insubstantial contacts in the United States.

As this Court has recognized, "[t]he Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections." Jifry v. FAA, 370 F.3d 1174, 1182 (D.C. Cir. 2004). As Cubaexport concedes, the relevant question here is whether it has "'substantial connections' with the United States." Cubaexport Opp. to Mot. to Dismiss (Docket No. 40), at 28 (quoting Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 201-02 (D.C. Cir. 2001)).

The district court erroneously concluded that so long as a non-resident alien has some United States interest that could give rise to a lawsuit, it must therefore have the necessary substantial connection to invoke the Due Process Clause. See JA 457 n.26. That reasoning cannot be right; if it were, the substantial connection test would be a nullity because every time it was invoked in litigation, the non-resident alien

would merely have to point to the existence of the litigation itself as proof of a substantial connection. And this Court has clearly held that non-resident aliens with real grievances – for example complaining that they have been designated as terrorist organizations by the United States Government – nonetheless cannot invoke the Due Process Clause because of insufficient contacts with the United States. See, e.g., 32 County Sovereignty Committee v. Dep't of State, 292 F.3d 797, 799 (D.C. Cir. 2002) (no due process rights for non-resident alien organization that had members in the United States who rented post office boxes and used bank account to transmit funds and information to the organization); People's Mojahedin Org. of Iran v. United States Dep't of State, 182 F.3d 17, 22 (D.C. Cir. 1999).

Cubaexport suggests that any property interest constitutes "'substantial connections,'" and relies upon its interest in the trademark registration that is the subject of this lawsuit. But this Court has never held that any property interest will suffice; to the contrary, the requirement of "substantial connections," implies that some property interests may be so insubstantial that they do not carry with them constitutional due process protections.

Cubaexport's interest in the HAVANA CLUB trademark registration is such an insubstantial connection to the United States. This registration is subject to the strict restrictions of the CACR, and is thus a very unusual and limited property right.

Under the usual circumstances (e.g. absent the applicability of the CACR), a valid trademark registration is "prima facie evidence" of, among other things, "the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce." 15 U.S.C. § 1057(b). But Cubaexport's HAVANA CLUB registration does not meaningfully serve those functions. Under the CACR, because Cubaexport is unquestionably a Cuban entity, it could not transfer or use the mark here without a specific license authorizing it to do so, even if it had a valid registration. See 31 C.F.R. § 515.201. Furthermore, a separate provision of § 211 precludes Cubaexport from judicially enforcing the mark, even if it had a valid registration. See § 211(a)(2), 112 Stat. at 2681-88. Cubaexport's only asserted connection to the United States is thus a trademark registration denuded of key proprietary rights. That is not the kind of substantial connection necessary to invoke the Due Process Clause of the Constitution.

B. Even Assuming Cubaexport Has Due Process Rights, Those Rights Were Respected.

1. Section 211 does not violate any substantive due process right.

Cubaexport's constitutional argument starts with the premise that a trademark registration is "perpetual" and can be renewed an infinite number of times "as a matter of right," and that therefore any change in the requirements for a renewal is

"retroactive." See Cubaexport Br. 6, 20, 24, 27. The idea that Cubaexport's HAVANA CLUB registration (which it obtained in 1976) is "perpetual" is far-fetched on its face; if it were, then Cubaexport would still have the registration and we would not be before this Court arguing over the renewal. Clearly, the registration is not perpetual, but rather subject to periodic renewal. See 15 U.S.C. § 1059.

Cubaexport bases its contrary argument primarily on two judicial opinions. The first, Qualitex Co. v. Jacobson Products Co., Inc., 514 U.S. 159, 165 (1995) (cited at Cubaexport Br. 24), simply states, in dictum, the uncontroversial point that "trademarks may be renewed in perpetuity." On its face, this does not mean that an original trademark registration grants the registrant perpetual rights without qualification. Indeed, many States allow drivers' licenses to be renewed "in perpetuity," but that does not mean that there are no conditions attached to renewal, that new conditions may not be added, or that renewal is automatic or cannot be denied. The other decision upon which Cubaexport relies, Ewing v. Standard Oil Co., 42 App. D.C. 321 (D.C. Cir. 1914) (cited at Cubaexport Br. 25) is over 90 years old, and, by Cubaexport's own admission, addressed an inapplicable outdated version of the trademark statute. It has no bearing here.

Interestingly, when Cubaexport addresses the version of the relevant statute under which it obtained its original HAVANA CLUB registration, the company

correctly notes that the statute "institute[d] a 20-year registration term." Cubaexport Br. 25. This statement belies Cubaexport's claim that it obtained a perpetual right when it registered the mark.[7]

Cubaexport also claims that renewal is "automatic," Cubaexport Br. 25, but that claim too is demonstrably false. Renewal is conditional. Conditions include the payment of a fee (whose amount is not specified in the statute and therefore is subject to administrative change) and the filing of a written application. See 15 U.S.C. § 1059; 37 C.F.R. §§ 2.181-2.186; In Re Holland Am. Wafer Co., 737 F.2d 1015 (Fed. Cir. 1984) (upholding USPTO refusal to renew registration where renewal application was filed too early). In addition, at each renewal period, registrants must also submit either proof that the mark is being used or an acceptable explanation for non-use accompanied by a statement that such non-use is not due to any intention to abandon the mark. See 15 U.S.C. § 1058(b); 37 C.F.R. §§ 2.160-2.166. Most importantly here, because 31 C.F.R. § 515.201 otherwise barred the renewal of the registration, renewal was contingent upon the continued effectiveness of the general

[7] And even the right to this 20-year (now 10-year) term is not absolute. A registered trademark is subject to cancellation. See, e.g., 15 U.S.C. §§ 1058(a), 1064, 1067, 1068, 1119; cf. Checkers Drive-In Restaurants, Inc. v. Comm'r of Patents & Trademarks, 51 F.3d 1078 (D.C. Cir. 1995) (affirming the cancellation – before the end of the initial registration term – of a mark for failure to timely file a statutorily required affidavit regarding continued use).

license with respect to the renewal of this particular mark (or the issuance of an applicable specific license).

The key question here is thus whether Cubaexport had a protectable property interest in the continued applicability of the general license. It did not. Under the CACR, a general license "may be amended, modified or revoked at any time." 31 C.F.R. § 501.803; 28 Fed. Reg. 6985 (July 9, 1963). Thus, Cubaexport was on notice that its ability to register or renew a trademark came solely from a general license that was expressly revocable without notice. See Dames & Moore v. Regan, 453 U.S. 654, 673 (1981) (where similar license could "'be amended, modified or revoked at any time,'" rights obtained pursuant to such license "were subordinate to" further governmental action, such as modifying or revoking the license).

Accordingly, when Congress acted to partially revoke the OFAC general license, it interfered with no settled expectation and therefore had no effect on protected property rights. See Bergerco Canada v. OFAC, 129 F.3d 189, 194 (D.C. Cir. 1997) (OFAC general license established no cognizable rights; if it did, "then virtually every licensing applicant would acquire protection from any rule-made variation in licensing standards, even where the original set of rules was vague or obviously provisional"); see also Lopez v. FAA, 318 F.3d 242, 249 (D.C. Cir. 2003) (no property interest in license renewal where regulations did not guarantee renewal);

Fried v. Hinson, 78 F.3d 688, 692 (D.C. Cir. 1996) (same); See also Conti v. United States, 291 F.3d 1334, 1341-42 (Fed. Cir. 2002) (finding no property interest in permit when regulations permitted government to "revoke, suspend, or modify" permit "at all times"); cf. United States v. Carlton, 512 U.S. 26, 33 (1994) ("Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code.").

Even if Cubaexport had some property interest in its ability to renew the HAVANA CLUB registration, that fact alone did not prevent Congress from changing the requirements for renewal. Cubaexport argues that doing so was "retroactive," but it was not. Had Cubaexport's existing registration been revoked, the company would at least have an argument that the application of § 211 to it was retroactive, but there was no such revocation here, and § 211 had no effect on the duration of the registration lawfully obtained (and renewed) pursuant to the previous version of the general license. Instead, § 211 only had an impact on what would happen in the future when that previously-existing registration expired according to its own terms in 2006, at which time the new, more limited, version of the general license applied. At that point, § 211 did prevent Cubaexport from obtaining a new property interest that it did not previously possess – namely, registration for the 10-year period ending in 2016. See JA 267 (noting the "fundamental difference"

between "defend[ing] existing property rights" and "acquir[ing] additional property rights").

In National Cable & Telecomm. Ass'n v. FCC, 567 F.3d 659 (D.C. Cir. 2009), this Court held that a new rule effectively abrogating previously executed contracts was not retroactive. In that case, cable companies had entered into exclusive agreements with owners of apartment buildings to provide cable services to the occupants of those buildings. The FCC found such contracts to be anti-competitive and banned them, meaning not only that it forbade new contracts (and renewal of old contracts) of this nature, but that it also forbade the future enforcement of previously entered contracts. Id. at 661. Although this new rule deprived the parties of contractual rights in which they had a reasonable expectation, this Court held that it was "not retroactive." Id. at 670; see Mobile Relay Assocs. v. FCC, 457 F.3d 1, 11 (D.C. Cir. 2006) (regulation prospectively limiting the use of previously-purchased licenses was "not retroactive"); see also Batjac Prods. Inc. v. GoodTimes Home Video Corp., 160 F.3d 1223, 1226 n.4 (9th Cir. 1998) (when terms applicable to copyright renewal were amended in 1992, the change was "prospective only," meaning that it did not apply to renewals before its enactment).[8]

[8] If Cubaexport were correct, then it would be "retroactive" for a State to impose new requirements on the renewal of a drivers' license, such as that the licensee pass a vision, hearing, or physical examination or that the licensee not have

Finally, even if § 211 were considered "retroactive," it would still not violate due process. Cubaexport suggests that the age of the past event to which a retroactive statute applies, alone, can render the statute unconstitutional. See Cubaexport Br. 29-31. But there is no support for this proposition, for which Cubaexport cites only a single case – Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), which generated no majority opinion and in which only a single Justice would have concluded that the statute violated Due Process. See Ass'n of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246, 1253 (D.C. Cir. 1998).

As Cubaexport concedes, even a retroactive statute survives due process review unless it does not serve any "'legitimate legislative purpose furthered by rational means.'" Cubaexport Br. 28 (citing United States v. Carlton, 512 U.S. 26, 30-31 (1994)). As the party attacking the rationality of Congress's enactment, Cubaexport bears "the burden 'to negative every conceivable basis which might support [the statute]." FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993); accord Richardson v. Simon, 560 F.2d 500, 505 (2d Cir. 1977) ("In analyzing whether [TWEA] violates the due process clause, we are not . . . limited to those purposes of the Act which Congress may have articulated.").

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been convicted of certain crimes, such as vehicular homicide, or never have been a member of a terrorist organization. This result would be illogical.

This is a heavy burden, and, tellingly, Cubaexport does not cite a single judicial decision holding any federal statute (much less a federal statute bearing directly on foreign policy) unconstitutional under this standard. See Carlton 512 U.S. at 32 (cited at Cubaexport Br. 28-29, and holding that retroactive application of statute "meets the requirements of due process"); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 19-20 (1976) (cited at Cubaexport Br. 29 and holding that "the Due Process Clause poses no bar" to the retroactive application of a statute imposing liability based on past employment). Indeed, Cubaexport "chiefly rel[ies]" on Richardson, 560 F.2dat 505, see Cubaexport Br. ix, 33, 34, which squarely held that TWEA, as applied in that case through the CACR, "does not . . . violate the fifth amendment's due process clause."

Instead of citing any relevant authority, Cubaexport simply asserts that § 211 lacks a legitimate purpose because it (1) it does not transfer nationalized property to its original owner; (2) does not further the interests of the Cuban embargo; and (3) serves the private interests of Bacardi, rather than the public interest. Cubaexport Br. 31-35. Each of these suggestions is defective. Cubaexport's statement that § 211 does not return nationalized property to its rightful owner, see Cubaexport Br. 33, while accurate, is irrelevant; the CACR furthers legitimate government interests without redistributing nationalized property. Indeed, it is legitimate for Congress to

condemn the confiscation of private property by the Cuban government without returning the confiscated property. See Glen v. Club Mediterranee, S.A., 450 F.3d 1251, 1255 (11th Cir. 2006) (noting that while Congress condemned Cuba's confiscations of private property as "'wrongful,'" it did not "proclaim them ineffective"). Cubaexport's claim that § 211 benefits Bacardi is similarly irrelevant. Most statutes, despite being enacted in the public interest, benefit some private entities and/or burden others. Accordingly, the existence of a benefit to Bacardi (and/or a detriment to Cubaexport) is irrelevant. Again, the only relevant question is whether § 211 rationally furthers a legitimate public interest.

Cubaexport's claims that § 211 does not comport with the alleged purposes of the CACR, see Cubaexport Br. 33-34, are both irrelevant and wrong. They are irrelevant because § 211 is a Congressional enactment that is valid if supported by any legitimate purpose, regardless of whether that purpose is the same as one of the purposes of the previously promulgated portions of the CACR. As it turns out, however, § 211 does further a legitimate governmental purpose that Cubaexport concedes is also one of the purposes of the CACR: it helps "deny resources to the Castro regime in order to hasten a transition to democracy in Cuba." JA 86; see Cubaexport Br. 33, 54 (conceding that this is one of the purposes of the CACR).

Cubaexport asserts that § 211 does not serve this purpose because Cubaexport

"can neither use the registered mark in commerce nor sell the registration without OFAC's permission." Cubaexport Br. 54. But, despite these limitations, Cubaexport concedes that it has significant business interests in renewing the registration, Cubaexport Br. 9, 46, and, indeed, its actions in this and related cases, and the resources Cubaexport has expended in its attempts to renew the registration demonstrate that its value to Cubaexport is high. Given the uncontested fact that Cubaexport pays taxes to Cuba, see, JA 455, the State Department and OFAC could reasonably conclude that denying the registration renewal to Cubaexport would likely also deny resources to the Cuban government.[9]

Section 211 serves an additional legitimate governmental interest, namely, the protection of the integrity of intellectual property by ensuring that the United States does not, without consideration of current foreign policy objectives, recognize rights to marks (and other intellectual property) that are the same as or substantially similar

[9] For example, even though Cubaexport cannot market its rum in the United States regardless of trademark registrations, if it were allowed to renew its HAVANA CLUB registration, that renewal might prevent Bacardi (and others) from using the HAVANA CLUB mark in the United States. Preventing the use of the mark in the United States, in turn, could enhance the value of the mark in other countries where Cubaexport does have the ability to sell its HAVANA CLUB product. Accordingly, the State Department and OFAC could reasonably conclude that allowing the renewal of the registration here could have an immediately positive financial effect on Cubaexport (and preventing renewal could have an immediately negative financial effect).

to intellectual property used in connection with confiscated assets. See JA 85. The government has an interest both in sanctioning Cuba's confiscation of private property and in ensuring the fairness of our intellectual property protections. These clearly legitimate purposes are apparent from the application of common sense to the plain language of the statute.

Moreover, the condemnation of, and attachment of negative consequences to, Cuba's expropriation of private assets is unquestionably a matter of foreign policy set by the political branches of government, not by Cubaexport. See Glen, 450 F.3d at 1255 (noting Congress's condemnation of Cuba's confiscations of private property). For this Court to second-guess that foreign policy decision would be to impermissibly "constitutionalize foreign policy choices that are committed to the political branches of government." Committee of United States Citizens v. Reagan, 859 F.2d 929, 944 (D.C. Cir. 1988). Indeed, United States policy toward Cuba is a constantly evolving and delicate balance, as is so common in matters of foreign policy, where some policies in particular areas may be conciliatory, while other policies in other areas may not. See Emergency Coalition to Defend Educational Travel v. United States Dep't of Treasury, 545 F.3d 4, 6-7 (D.C. Cir. 2008) (noting that "over the years, [the CACR's] scope and stringency have waxed and waned in response to the shifting foreign policies of succeeding presidential administrations"); United States v.

Plummer, 221 F.3d 1298, 1309 (11th Cir. 2000) (noting that courts have "rejected attempts to 'second-guess' the CACRs on the ground that the regulations serve no rational purpose in light of changing global or national political priorities"); United States v. Rojas, 47 F.3d 1078, 1083 (11th Cir. 1995) (Fay, J., dissenting) (noting that "our country's policy towards Cuba changes rapidly (some would say on a daily basis)").

Congress struck that balance in enacting § 211, and neither Cubaexport nor this Court has a basis for concluding that its decision in this regard was illegitimate. Indeed, Cubaexport cites no judicial opinion holding illegitimate and/or unconstitutional this type of foreign policy judgment by Congress. And there are numerous contrary examples, especially with respect to statutes related to foreign policy. For example, in Kuhali v. Reno, 266 F.3d 93, 110 (2d Cir. 2001), the court addressed an immigration statute, enacted in 1996, that rendered an alien deportable on the basis of a gun-related felony conviction that had occurred in 1980. Although this statute was unquestionably retroactive, the court held that it did not violate constitutional due process. It was supported by an interest in removing dangerous aliens from this country (despite the fact that Congress had not used this particular measure of dangerousness before the 1996 enactment). Id. at 111; see Sena v. Gonzalez, 428 F.3d 50, 53 (1st Cir. 2005) (same for non-violent criminal immigration

offense).

2. OFAC's application of § 211 here did not violate procedural due process.

We have noted above that Cubaexport is not entitled to due process protections, both because Cubaexport lacks sufficient connection to the United States and because it had no constitutionally protected property interest in the ability to renew the HAVANA CLUB mark. Should the Court disagree, it should nonetheless reject Cubaexport's procedural due process claims because OFAC provided Cubaexport with all of the procedure that would have been due had the Due Process Clause applied.

Cubaexport claims that it was not given notice and the opportunity to be heard with respect to the application of the general license. Cubaexport Br. 40-45. This claim is false. As the district court noted, OFAC's April 6, 2006 "letter specifically put Cubaexport on notice that it would need 'to request separate authorization from OFAC to engage in transactions related to the renewal of the HAVANA CLUB trademark '" and that it could "request a specific license, seek further guidance, or ask any further questions before the renewal deadline passed." JA 459 (quoting JA 137). Cubaexport's suggestion that this letter "did not even hint that OFAC was considering the applicability of the general license," Cubaexport Br. 42, is incorrect.

The letter not only states that the previously granted specific licenses with respect to legal representation did not authorize the payment of the renewal fee, but also that Ropes & Gray could request a specific license that would authorize such a payment. See JA 136-137. These statements would have been meaningless had the general license applied. See 31 C.F.R. § 501.801(a) (OFAC's policy "not to grant applications for specific licenses authorizing transactions to which provisions of an outstanding general license are applicable").

Moreover, the next day, Cubaexport's counsel sent a letter demonstrating his understanding of this point. First, the letter requested a specific license allowing the payment of the renewal fee. See JA 132. The reason such a request was necessary was that the general license did not authorize the payment of the renewal fee. See JA 459 & n.27 (application for the specific license demonstrates that the April 6, 2006 letter put Cubaexport on notice that a specific license was required). Cubaexport's counsel's letter goes on to state that the amount of the renewal fee will depend entirely upon the effective date of any specific license that is issued. See JA 133. Again, this fact demonstrates Cubaexport's counsel's understanding that the United States Government's refusal to accept its tender of the renewal fee would be cured by the issuance of a specific license, an understanding that makes no sense unless the general license did not apply.

Further demonstrating its notice of the Government's views, Cubaexport's counsel wrote a letter to the USPTO dated June 14, 2006, arguing that USPTO "should not conclude that the CACR prohibit renewal of the registration," JA 117, and, more specifically, that USPTO should "interpret the general license provisions of 31 [C.F.R.] § 515.[5]27(a)," and should conclude that those provisions do not prohibit payment of the renewal fee, JA 118. The letter goes on to argue at length why the USPTO should interpret the general license in this way. JA 118-123; see JA 459-460 (noting that Cubaexport "argued to the USPTO that the USPTO should renew Cubaexport's trademark pursuant to the general licensing provision").[10]

Although this letter was addressed to the USPTO, Cubaexport contemporaneously provided a copy to OFAC, and it did so well aware that OFAC (not the USPTO) is responsible for administering the CACR, including the general license at issue here. Under these circumstances, Cubaexport was obviously on notice not only that OFAC might decide the applicability of the general license, but that it might do so directly in response to Cubaexport's own request. Cubaexport affirmatively asked the Government to decide this issue, and should not be heard now to claim that the Government decided it "unprompted." Cubaexport Br. 3.

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[10] Although Cubaexport made this argument, it did not provide any supporting evidence to either OFAC or the USPTO, despite the opportunity to do so. See JA 460 n.29.

Finally, Cubaexport not only had the opportunity to be heard on this issue – it was heard. Cubaexport sent a copy of its June 14, 2006 letter to OFAC, and that letter became a part of the OFAC administrative record in this case. JA 117-123. The letter contained a detailed recitation of Cubaexport's views on the applicability of the general license, and it was actually considered by OFAC. See JA 275 ¶ 9; JA 279-230 ¶ 26. Moreover, if there was any legitimate question, Cubaexport had the opportunity to request "further explanation of the reasons for a denial by correspondence or personal interview," to apply to reopen its license application, or to file a further application. See JA 279 ¶ 24; see also 31 C.F.R. § 501.801(b). Cubaexport availed itself of none of these options, even though they would have provided the company with further opportunity to be heard on the issue.

II. OFAC COMPLIED WITH THE APA.

A. OFAC's Denial of the Specific License was not Arbitrary, Capricious, or Contrary to Law.

As the district court correctly noted, judicial review of OFAC's decisions to deny specific licenses is limited. OFAC's decisions in this area are "entitled to great deference." De Cuellar v. Brady, 881 F.2d 1561, 1570 (11th Cir. 1989). Where, as here, the rationale for the denial rests on the foreign policy of the United States, the judiciary is particularly ill-suited to second-guess the decisions of the Executive. See,

e.g., Regan v. Wald, 468 U.S. 222, 242 (1984) ("Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'") (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952)). Cubaexport's APA claims must be evaluated in light of this highly deferential standard of review, and none of those claims justifies reversing OFAC's decision here.

Cubaexport argues here, as it did unsuccessfully below, that, having licensed various transactions relating to legal representation associated with USPTO Board proceedings regarding the cancellation of the HAVANA CLUB mark, OFAC was required to license transactions related to the renewal of the registration because that renewal would "preserve the status quo in that litigation." Cubaexport Br. 52. The district court has already cogently explained why Cubaexport is wrong. First, as a simple matter of logic, it is different to defend a pre-existing registration than it is to renew the registration. An initial registration (and the defense of that registration against cancellation) is separate from the renewal of that registration.[11] Indeed,

[11] See, e.g., Head v. New Mexico Bd. Of Examiners in Optometry, 374 U.S. 424, 439 (noting, in the context of broadcast licenses, that the same abuses that might not constitute "a sufficient basis for revocation proceedings," might, nonetheless justify a refusal to renew); Kuczo v. Western Conn. Broadcasting. Co., 566 F.2d 384, 386 (2d Cir. 1977) (in the same context, censorship was not deemed sufficient to revoke existing license but was sufficient to deny request to renew that license); Hamlin Testing Labs., Inc. V. United States Atomic Energy Comm'n, 357 F.2d 632,

separate regulatory provisions address the type of specific license that OFAC issued here, authorizing payments for legal services with respect to the cancellation proceedings, see 31 C.F.R. § 515.512, and the type of specific license that OFAC declined to issue here, authorizing payment of a trademark renewal fee, see id. § 515.527. Accordingly, there is nothing inherently arbitrary about OFAC's decision to license payments for legal services in defense of Cubaexport's extant registration but, at the same time, to refuse to license the payment of non-legal registration renewal fees for that same registration.

Second, the commonsense distinction between defending existing rights and extending those rights beyond their current term is reinforced here by congressional action. In enacting § 211, Congress itself made the same distinction that OFAC later did in its licensing decisions; with respect to the trademarks to which it applies, § 211(a)(1) does not cancel any registration lawfully obtained (or renewed) under the previous version of the general license, but it does forbid the use of that general license to authorize the payment of the fees necessary to renew those same

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638 (6th Cir. 1966) (in the context of license to perform industrial radiography, "suspensions, modifications and revocation of existing licenses" are different from (and subject to different rules than) "issuance and renewals of licenses"); Flesner v. City of Ely, 863 F. Supp. 971, 973 n.2 (D. Minn. 1994) (in the context of local liquor licenses, distinguishing "a decision not to renew expiring licenses" from "a revocation of existing licenses").

registrations in the future. It is not arbitrary for an agency in implementing a statute to make the same distinctions that Congress made in enacting that statute.

Third, the entire scheme of the CACR suggests that specific licenses be interpreted narrowly. The regulations begin with a blanket prohibition of a large class of transactions and then provide general licenses to authorize specified subclasses of transactions. Specific licenses are intended, as their name suggests, to authorize appropriate specific transactions that are otherwise barred. At base, Cubaexport is suggesting that this Court create a new general license that would authorize any transaction necessary to maintain the status quo in judicial (or perhaps administrative) proceedings as to which OFAC has already specifically licensed the payment of legal fees. But this Court is not authorized to promulgate general licenses; that task falls to the Executive, which has not promulgated any general rule of the type sought by Cubaexport.

Cubaexport also suggests that OFAC acted arbitrarily in consulting with the State Department and in relying on the State Department's conclusion that granting the specific license here would be inconsistent with the foreign policy of the United States. Cubaexport Br. 53. This objection seems odd. This Court's "deference to the State Department on questions of foreign policy is great," Palestine Information Office v. Shultz, 853 F.2d 932, 942 (D.C. Cir. 1988), and it therefore makes sense for

OFAC to also give weight to State Department pronouncements with respect to foreign policy. Nor does (or could) Cubaexport contend that foreign policy concerns are irrelevant in OFAC's licensing decisions. See, e.g., American Airways Charters, Inc. v. Regan, 746 F.2d 865, 870-71 (D.C. Cir. 1984) (CACR serves "foreign policy purposes"); Paradissiotis v. Rubin, 171 F.3d 983, 988 (5th Cir. 1999) (Libyan sanction regulations, analogous to the CACR, "involve foreign policy and national security, and we are particularly obliged to defer to the discretion of the executive agencies [including OFAC] interpreting their governing law and regulations").

Moreover, in enacting § 211 here, Congress repealed the previous general license that would have authorized transactions relating to Cubaexport's renewal of its HAVANACLUB registration (and the registrations of other marks similarly related to confiscated businesses or assets). While Cubaexport is surely correct that OFAC retains discretion to issue specific licenses for transactions covered by § 211(a)(1), see Cubaexport Br. 55, OFAC manifestly acted reasonably here by denying the requested specific license for foreign policy reasons fully consistent with those underlying § 211.

In response to these points, Cubaexport makes two weak arguments. First, Cubaexport says that, because it cannot actually use its registered mark in the United States, denying it the ability to renew its registration does not serve the foreign policy

interests of the United States, but rather "offends U.S. policy." Cubaexport Br. 54. We explain on page 36, above, why this contention is wrong: preventing renewal could deny resources to the Cuban government because it could have an immediately negative financial effect on Cubaexport, which pays taxes to the Cuban government.

It is also wrong to suggest that keeping funds out of the hands of the Cuban government is the only policy embodied in the CACR. Cubaexport does not set United States policy nor can it dictate what that policy is. Instead, the political branches of our Government set such policy, and here, Congress has done so, in part, by enacting § 211 and thereby instituting a policy against the future automatic authorization to register or renew marks that had been used in connection with a confiscated business. Similarly, the State Department has indicated a "U.S. approach toward non-recognition of trademark rights associated with confiscated property." JA 85. Neither Congress nor the Executive is required to justify its foreign policy position in this regard to Cubaexport. See, e.g, Regan v. Wald, 468 U.S. 222, 242 (1984) ("Matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'") (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952)). Nonetheless, we note that the policy justification for the Government's actions here are readily apparent. The Government seeks to condemn and attach

negative consequences to the Cuban government's acts of confiscation of private property. It did so in § 211 by making the general license inapplicable to the renewal by Cuban entities of registrations of marks used in connection with confiscated businesses or assets, and it similarly did so by denying the specific license at issue here.

Cubaexport also asserts that § 211 does not establish a United States policy against renewal of the marks to which § 211 applies because it grants the Secretary of the Treasury discretion to grant specific licenses allowing transactions related to such renewals. See Cubaexport Br. 54-57. This analysis is misguided; Congress and the Executive Branch together have established United States policy in this area, and the fact that OFAC is given discretion to grant specific licenses in individual circumstances does not mean that no policy exists. For example, although it is generally the foreign policy of the United States to prevent the flow of funds to the Cuban government, OFAC has discretion to grant specific licenses that will result in the flow of such funds. See Emergency Coalition to Defend Educational Travel v. United States Dep't of Treasury, 545 F.3d 4, 6 (D.C. Cir. 2008) (although "[t]he essential objective of the embargo" is "to isolate the Cuban government by depriving the island's economy of the benefit of U.S. dollars," specific licenses may be granted to allow travel to Cuba). When issuing or denying a specific license, OFAC works

with advice from the State Department to carry out the Executive's foreign policy decisions, which may balance multiple interests. Here, OFAC's authority to grant specific licenses authorizing the renewal of "confiscated marks" if the balance of interests ever warrants does not negate the fact that the United States has one such foreign policy interest with respect to the "non-recognition of trademark rights associated with confiscated property," JA 85.

The Supreme Court addressed a similar issue in Zemel v. Rusk, 381 U.S. 1 (1965). After the Communist revolution in Cuba, the State Department "declared all outstanding United States passports (except those held by persons already in Cuba) to be invalid for travel to or in Cuba 'unless specifically endorsed for such travel under the authority of the Secretary of State.'" Id. at 3. The fact that the Secretary could grant exceptions to this travel ban did not negate the general policy disfavoring travel to Cuba, and the Supreme Court upheld the Secretary's decision in that case to refuse to grant an exception to Zemel, who purported to seek to travel to Cuba, "to satisfy [his] curiosity about the state of affairs in Cuba and to make [himself] a better informed citizen." Id. at 4.

B. OFAC Complied with the APA in Determining that a Specific License was Required for Renewal of the HAVANA CLUB Registration.

1. The APA does not impose any procedural requirements here.

Cubaexport claims that the APA required that OFAC provide it with notice and the opportunity to be heard before OFAC determined that the general license in 31 C.F.R. § 515.527 did not permit the payment of a registration renewal fee for the HAVANA CLUB mark and that therefore a specific license was necessary for that renewal. Cubaexport Br. 40.

Cubaexport fails to identify an agency action related to the general license with respect to which the APA requires notice and/or the opportunity to be heard. The determination that the general license did not authorize the renewal payment here was contained in the July 28, 2006 letter from OFAC, and does not constitute the kind of formal adjudication or rulemaking to which the APA applies. See 5 U.S.C. § 553 (applying to "rule making"); id. § 554(a) (applying to "adjudication required by statute to be determined on the record after opportunity for an agency hearing"). At most, the statement in the July 28, 2006 letter from OFAC reflects an informal adjudication of the applicability of the general license to the renewal of the HAVANA CLUB registration, and informal adjudication does not trigger the APA's

requirements with respect to notice or the opportunity to be heard. See PBGC v. LTV Corp. 496 U.S. 633, 655-656 (1990); Sprint Corp. v. FCC, 315 F.3d 369, 373 (D.C. Cir. 2003) (citing Sugar Cane Growers Coop. v. Veneman, 289 F.3d 89, 95-96 (D.C. Cir. 2002)); Darrell Andrews Trucking, Inc. v. FMCSA, 296 F.3d 1120, 1134 (D.C. Cir. 2002). The district court thus correctly held that "the APA does not require a hearing or 'quasi-judicial procedures' in this case." JA 444.

Cubaexport tries to get around this problem on appeal by suggesting that OFAC "revoke[d] a previously issued license," Cubaexport Br. 40, namely the "general license," Cubaexport Br. 41. Cubaexport argues that this supposed license revocation is governed by 5 U.S.C. § 558. See Cubaexport Br. 41-44. But OFAC did not revoke the general license that previously authorized the renewal of the HAVANA CLUB trademark; Congress did by enacting § 211. And, of course, the procedural requirements of the APA do not apply to Congress, see, e.g., Franklin v. Mass., 505 U.S. 788, 800 (1992) (APA applies to agencies, and its definition of agency excludes "'the Congress'") (quoting 5 U.S.C. § 551(1)(A)), especially where, as here, Congress expressly altered the general license "[n]otwithstanding any other provision of law," § 211(a)(1), 112 Stat. at 2681-88. OFAC did not "revoke" the general license, it merely applied that license, as previously limited by Congress, to the HAVANA CLUB mark. As noted above such an application of a rule to facts is

an informal adjudication not subject to the APA's procedural requirements.[12]

2. OFAC's determination that § 211 applies (and therefore renewal required a specific license) was reasonable.

Cubaexport wrongly asserts that OFAC acted arbitrarily, capriciously, or contrary to law in holding that, under § 211, the general license does not apply to the HAVANA CLUB mark and, therefore, the renewal fee for the HAVANA CLUB registration could not be paid without a specific license. Throughout this litigation, Cubaexport has maintained that "[s]ection 211 and the amended regulation that copies it actually are aimed at one and only one trademark: HAVANA CLUB." Cubaexport Mem. in Supp. of Summary Judgment (Docket No. 35), at 9; accord id. at 32.[13] In other words, by Cubaexport's own admission, the only way for OFAC to give effect to congressional intent was to conclude that § 211 does apply to the HAVANA CLUB mark (and therefore that a specific license was necessary for renewal).

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[12] At any rate, as noted in section I.B.2, above, even if the APA did require notice and the opportunity to be heard, Cubaexport was given that notice and opportunity, and, indeed, was heard.

[13] See also Cubaexport Br. 10-11 (referring to § 211 as the "Bacardi bill" and suggesting that the section's sole purpose was to advance Bacardi's interests in the HAVANA CLUB mark); id. at 34-35 (quoting statements of two Senators to the effect that § 211 affects only the HAVANA CLUB mark); Cubaexport Opposition to Motion to Dismiss (Docket No. 40), at 18 (§ 211 "was plainly aimed at the HAVANA CLUB registration").

Moreover, the specific arguments Cubaexport makes in support of its claim that OFAC arbitrarily applied the general license, as limited by Congress, lack merit. This is especially true bearing in mind the great deference to which OFAC licensing decisions are entitled. See page 43, above. Cubaexport argues that the same principles of issue preclusion apply to administrative proceedings as to judicial proceedings, and that, under those principles, OFAC erred in considering factual findings made in litigation in the Southern District of New York and the Second Circuit concerning the HAVANA CLUB trademark. Cubaexport Br. 45-48. This argument misses the point, as the district court properly understood. OFAC did not treat the judicial findings as preclusive, but merely as evidence that provided a basis for its decision and was considered along with everything in the administrative record, including Cubaexport's submissions. See JA 274 ¶ 9 (OFAC's conclusion regarding the applicability of the general license "was based on various legal proceedings and judicial findings concerning the HAVANA CLUB trademark, and it took into consideration correspondence from Bacardi-Martini USA, Inc., as well as correspondence sent by Cubaexport to the U.S. Patent and Trademark Office."). Cubaexport's lengthy recitations regarding issue preclusion are thus simply irrelevant.

Next, Cubaexport asserts that OFAC erred in relying on two of the Second Circuit's specific holdings because, according to Cubaexport, OFAC should have

known that those holdings were wrong. See Cubaexport Br. 48-51. But the only question here is whether OFAC was reasonable in relying on the Second Circuit's findings, not whether those findings were correct, and an agency surely acts reasonably when it relies on findings of Article III courts. See JA 445; cf. Holy Land Foundation for Relief and Development v. Ashcroft, 333 F.3d 156, 162 (D.C. Cir. 2003) (OFAC properly relied upon "findings by both Israeli and Palestinian governmental authorities").[14]

At any rate, Cubaexport's specific claims regarding OFAC's reliance on judicial findings are incorrect. Cubaexport first suggests that OFAC, unlike the Second Circuit, should have credited Cubaexport's argument that Jose Arechabala was insolvent when it was nationalized and that therefore its owners received "adequate and effective compensation," even though they received no compensation at all. Cubaexport Br. 48-49. The Second Circuit's disposition of this question is not directly relevant here, however, because Cubaexport failed to make this argument in

[14] Cubaexport also wrongly claims that OFAC relied on bare "allegations" by Bacardi. Cubaexport Br. 47 (citing JA 276-77). The referenced pages of the joint appendix demonstrate the opposite. OFAC did not credit Bacardi's claim to be Jose Arechabala's successor in interest, noting instead that the only relevant fact (which is uncontested) is that Bacardi had not consented to the renewal of the HAVANA CLUB mark by Cubaexport and that Cubaexport did not contend that any other entity was such a successor and had consented. JA 277 ¶ 18; see JA 445 n.12 (district court noting that "OFAC never found that Bacardi was the bona fide successor-in-interest of the mark").

these administrative proceedings. Instead, Cubaexport asserted that "neither the HAVANA CLUB trademark nor a business or assets associated with the trademark . . . were nationalized without compensation," JA 121 (emphasis added). In short, before OFAC, Cubaexport argued only that there was compensation; it never asserted that no compensation was necessary, and it therefore cannot assert that the agency's failure to consider this issue was arbitrary or capricious.[15]

Cubaexport also faults OFAC for following the Second Circuit in refusing to consider whether Jose Arechabala had abandoned the trademark in the 1970s, which, Cuba alleges, means that Bacardi is not the statutory "bona fide successor-in-interest." See Cubaexport Br. 47, 50-51 (arguing that the Second Circuit incorrectly answered this question but the USPTO Board answered it correctly).[16] But this question is also irrelevant to OFAC's determination at issue. The legally relevant questions are whether HAVANA CLUB is a mark "that is the same as or substantially

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[15] At any rate, Cubaexport's argument that Jose Arechabala was valueless when it was nationalized is hypocritical. Cubaexport acknowledges that among Jose Arechabala's assets at the time of its seizure was the very trademark that is the subject of this lawsuit and that Cubaexport obviously views as extremely valuable.

[16] Cubaexport represents to this Court that the USPTO Board held that Jose Arechabala had abandoned its United States registrations. See Cubaexport Br. 6, 14, 47. That representation is false. See Galleon, 2004 WL 199225, at *22 (holding the claim of abandonment of the mark to be "inapplicable to this case" and explicitly dismissing that claim without deciding it.

similar to a mark . . . that was used in connection with a business or assets that were confiscated," and whether "the original owner of the mark, trade name, or commercial name, or the bona fide successor-in-interest has expressly consented." § 211(a)(1), 112 Stat. at 2681-88; 31 C.F.R. § 515.527. OFAC first determined that the mark met the criteria with respect to confiscation. This only left the question of whether the original owner or successor-in-interest had expressly consented. Whether Bacardi is a statutory successor-in-interest is irrelevant because it is uncontested that it did not consent, and Cubaexport does not contend that some other entity is the statutory successor-in-interest and has consented. See JA 277 ¶ 18. There was thus no need for OFAC to consider whether Jose Arechabala abandoned the mark or whether Bacardi was the statutory successor-in-interest.

Cubaexport asserts that the United States took a contrary position before the World Trade Organization ("WTO"). Specifically, Cubaexport alleges that the United States assured the WTO "that Section 211 could not apply to a mark that had been abandoned by its original owner." Cubaexport Br. 50. But Cubaexport does not accurately convey the Government's position in the WTO litigation. In its submissions to the WTO dispute settlement panel, the United States observed that § 211 did not specifically refer to "abandonment," that "abandonment is a legal determination that depends on the factual circumstances," and that "it is not clear how

U.S. courts will treat the issue of abandonment if presented in with specific facts in the context of section 211 (although one court has suggested that section 211 applies regardless of whether the trademark has been abandoned) . . . ." Responses of the United States to Questions from the Panel, United States – Section 211 Omnibus Appropriations Act (DS176) (February 5, 2001), ¶¶ 71-72 (Answer to Panel Question 28); see also id. ¶ 7 (Answer to Panel Question 1(d)). In sum, OFAC reasonably concluded that is was irrelevant whether Jose Arechabala had subsequently abandoned its interests in the HAVANA CLUB mark, and that reasonable conclusion creates no inconsistency in the Government's position on this issue.

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

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MARCH 2010

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). The foregoing brief is presented in proportional Times New Roman font in 14 Point. The brief (from the start of its Statement Of Jurisdiction through the end of its Conclusion) contains 12,989 words according to the count of this office's word processing system.

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CERTIFICATE OF SERVICE

I certify that on March 15, 2010, I filed the foregoing brief with the Court by using the appellate CM/ECF system, and by causing eight paper copies to be delivered to the Court by hand delivery within two business days. I further certify that the following counsel are registered CM/ECF users and that service will be accomplished through the appellate CM/ECF system:

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